IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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| HUMANA, INC., | ) | |
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| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. 2:14-cv-02405-JTF-cgc |
| | ) | |
| MEDTRONIC SOFAMOR DANEK USA, INC. and MEDTRONIC, INC., | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER DENYING PLAINTIFF'S MOTION UNDER 28 U.S.C. § 1292(b) TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL**

Before the Court is Plaintiff Humana Inc.'s ("Plaintiff") Motion under 28 U.S.C. § 1292(b) to Certify Order for Interlocutory Appeal filed May 17, 2016. (ECF No. 59). Specifically, Plaintiff requests that the Court certify with respect to its denial of Plaintiff's motion to amend the common law fraud claim (Count 1), the claims of violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (Counts 2-3), and the claim of common law negligent misrepresentation (Count 4). Defendants Medtronic Sofamor Danek USA, Inc. and Medtronic, Inc. ("Defendants") responded in opposition to Plaintiff's Motion on June 3, 2016. (ECF No. 60). For the following reasons, Plaintiff's Motion under 28 U.S.C. § 1292(b) to Certify Order for Interlocutory Appeal is **DENIED**.

## LEGAL STANDARD

Twenty-eight U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference

> of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeal which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Courts consider three factors in deciding whether to grant an interlocutory appeal: whether (1) "the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of litigation." *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002) (citations omitted). Review under § 1292(b), is "granted sparingly and only in exceptional cases." *Id*; *see also In re Regions Morgan Keegan ERISA Litig.*, 741 F. Supp. 2d 844, 848 (W.D. Tenn. 2010) (citation omitted) ("An interlocutory appeal should 'be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation."). The party seeking an interlocutory appeal has the burden of showing exceptional circumstances exist warranting an interlocutory appeal. *Coming Up v. City & County of San Francisco*, 857 F. Supp. 711, 718 (N.D. Cal. 1994). "[D]oubts regarding appealability … [should be] resolved in favor of finding that the interlocutory order is not appealable." *United States v. Stone*, 53 F.3d 141, 143-44 (6th Cir. 1995) (quoting *In re Westwood*, 971 F.2d 387, 390 (9th Cir. 1992)).

## ANALYSIS

### ***1. Controlling Question of Law***

Plaintiff asserts that this case presents circumstances warranting interlocutory appellate review. Specifically, Plaintiff argues that the issues addressed by the Court regarding the standards for pleading fraud, RICO, and negligent misrepresentation materially affect the outcome of this case. Conversely, Defendants contend that Plaintiff fails to assert controlling questions of law because: (1) its disagreement with the Court's application of settled legal standards to its allegations does not raise a question of law, and (2) the only issues raised by Plaintiff in its Motion are not controlling.

A legal issue is controlling if it could materially affect the outcome of the case. *See In re Baker & Getty Fin. Servs., Inc. v. Nat'l Union Fire Ins. Co.*, 954 F.2d 1169, 1172 n.8 (6th Cir. 1992). "Appellate courts have narrowed this definition to apply only to 'pure questions of law' where a ruling can be made without the appellate court delving into the record." *Miller v. Uchendu*, No. 13-CV-02149-SHL-DKV, 2015 WL 7709414, at *2 (W.D. Tenn. July 24, 2015) (citations omitted). Furthermore, a controlling question of law generally does not include matters within the discretion of the trial court." *In re Memphis*, 293 F.3d at 351 (citing *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994)).

Defendants argue that denial of leave to amend is not a controlling question of law for purposes of certifying an interlocutory appeal. Defendants correctly assert that the grant or denial of an opportunity to amend is within the discretion of the court. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Crestwood Farm Bloodstock v. Everest Stables, Inc.*, 751 F.3d 434, 444 (6th Cir. 2014) (stating that the lower court's denial of a motion to amend cannot be overturned unless the court abused its discretion). However, "[i]f the denial of the motion to amend is based on it being futile, or solely on the legal conclusion that the amended pleading would not withstand a motion to dismiss, then it is reviewed de novo." *Dubuc v. Green Oak Twp.*, 312 F.3d 736, 744 (6th Cir. 2002). Here, the Court denied Plaintiff's Motion to Amend for counts 1-4 on the grounds that it could not survive a 12(b)(6) motion, finding that an amendment would be futile. Therefore, a finding that Plaintiff has not raised controlling questions of law because a motion to amend is within the discretion of the Court would be improper.

Plaintiff asserts that it has identified three specific controlling questions of law: (1) whether Plaintiff sufficiently pleaded a claim of common law fraud in Count 1 of the proposed Second Amended Complaint ("SAC"); (2) whether Plaintiff sufficiently pleaded claims under the RICO Act in Counts 2 and 3 of the SAC; and (3) whether Plaintiff sufficiently pleaded a claim of common law negligent misrepresentation in count 4 of the SAC. However, Plaintiff's disagreement with the Court's application of well-settled legal standards to the facts alleged in its SAC does not raise controlling questions of law.

***2. Substantial Ground for Difference of Opinion***

Courts within this District have found that a "substantial ground for difference of opinion" exists when: "'(1) the issue is difficult and of first impression; (2) a difference of opinion exists within the controlling circuit; or (3) the circuits are split on the issue.'" *In re Regions Morgan Keegan ERISA Lit.*, 741 F. Supp. 2d 844, 849 (W.D. Tenn. 2010) (quoting *Gaylord Entm't Co. v. Gilmore Entm't Group*, 187 F. Supp. 2d 926, 956 (M.D. Tenn. 2002)). The Court finds that the relevant pleading standards are not one of first impression, and Plaintiff has not demonstrated a substantial ground for difference of opinion.

Plaintiff argues that the holding of *In re Avandia Mktg., Sales Practices & prod. Liab. Litig.*, 804 F.3d 633 (3d Cir. 2015) provides this Court with instruction to certify the interlocutory appeal. The court in Avandia, in pertinent part, stated:

> While such certification should be used "sparingly and in exceptional circumstances" the Court finds that certification for interlocutory appeal is appropriate here. Resolving the Motion to Dismiss required the Court to consider divergent rulings reached by different appellate circuits and district courts on controlling issues of law. The Court finds that immediate appeal may materially advance the termination of this litigation, as resolution of these unsettled issues of law in Defendant's favor would avoid the necessity of litigating these complex, class action lawsuits, and resolution in Plaintiffs' favor is likely to decrease motion practice and clarify the legal standards so that the parties understand what factual evidence they must develop for trial.

(ECF No. 60-1 at 1-2).

Here, the Court did not consider divergent rulings reached by different appellate circuits and district courts to reach its determination. Instead, the Court applied well-established pleading standards as pronounced in the Sixth Circuit to Plaintiff's allegations. Furthermore, it appears to the Court that Plaintiff is challenging this Court's application of the pleading standards to its allegations rather than presenting a case where there are substantial disputes as to the applicable law. "The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case." *Miller*, 2015 WL 7709414, at *2 (quoting *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004)). Plaintiff attempts to re-assert arguments that it has previously raised and re-cites the same authorities the Court has already considered and distinguished. The substantial ground requirement has been characterized as "genuine doubt or conflicting precedent as to the correct legal standard." *Hurley v. Deutsche Bank Tr. Co. Ams.*, No. 1:08-CV-361, 2009 U.S. Dist. LEXIS 33654 at *11-12 (W.D. Mich. Apr. 21, 2009). Plaintiff's arguments fail to meet this standard. As such, the second requirement of § 1292(b) is not satisfied.

### 3. *Immediate Appeal may* **Materially Advance the Ultimate Termination of Litigation**

An immediate appeal may materially advance the ultimate termination of litigation and is favored when "reversal would substantially alter the course of the district court proceedings or relieve the parties of significant burdens" and/or would "potentially save judicial resources and litigant expenses." *W. Tenn. Chapter of Ass'n Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1026 (W.D. Tenn. 2000). The Sixth Circuit has found that the resolution of a district court's ruling will not materially advance the ultimate termination of the litigation "'[w]hen litigation will be conducted in substantially the same manner regardless of [the court's] decision.'" *In re City of Memphis*, 293 F.3d at 351 (quoting *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994)).

An immediate appeal would not materially advance the ultimate conclusion of this case. Plaintiff argues that it makes sense to allow an appeal now so that all of its viable causes of action may be the subject of a single discovery period, a single summary judgment motion, and a single trial. However, this argument could be made for any order that dismisses a claim. Plaintiff has failed to establish a substantial ground for difference of opinion. As such, Plaintiff has also failed to show that this is an exceptional circumstance that would justify a departure from the ordinary rule of postponing judicial review until after entry of final judgment. *See In re Regions Morgan Keegan ERISA Litig.*, 741 F. Supp. 2d 844, 851 (W.D. Tenn. 2010).

## CONCLUSION

Plaintiff has failed to present compelling grounds to support its Motion under 28 U.S.C. § 1292(b) to Certify Order for Interlocutory Appeal. Therefore, Plaintiff's Motion is **DENIED**.

**IT IS SO ORDERED** this 9th day of December, 2016.

***s/John T. Fowlkes, Jr.***
JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT JUDGE